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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DUNCAN ENERGY COMPANY, NBB OIL & GAS PARTNERS (U.S.A.), AMERADA HESS CORPORATION, TYREX OIL COMPANY AND TURTLE MOUNTAIN GAS & OIL, INC.,
Petitioners,

v.

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION; THREE AFFILIATED TRIBES TRIBAL BUSINESS COUNCIL; THREE AFFILIATED TRIBES TAX COMMISSION; WILBUR D. WILKINSON, CHAIRMAN, TRIBAL BUSINESS COUNCIL; JOSEPH J. WALKER, TAX COMMISSIONER; AND MARCUS WELLS, JR., DIRECTOR, TRIBAL EMPLOYMENT RIGHTS OFFICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

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I. RESPONDENTS IMPROPERLY RELIED ON THE PRECEDENTIAL EFFECT OF THE COURT'S DENIAL OF CERTIORARI IN ANOTHER CASE TO OPPOSE ISSUANCE OF THE WRIT HERE, CONSEQUENTLY FAILING TO ADDRESS RESPONDENTS' ARGUMENTS THAT EXHAUSTION UNDER THESE FACTS WOULD BE ANOMALOUS AND THE AMICI'S ARGUMENTS THAT A CONFLICT EXISTS BETWEEN CIRCUITS AND WITHIN CIRCUITS AS TO THE CONTOURS OF THIS DOCTRINE.

1. The Respondents ("Tribes") rely on the Court's denial of certiorari in another case, *Middlemist v. Babbitt*, No. 94-42, 63 U.S.L.W. 3346 (U.S. Oct. 31, 1994), in

opposing certiorari here, erroneously assuming such denials have precedential effect. To be sure, Petitioners ("Duncan Energy") alerted the Court to what they considered to be a similar case raising issues worthy of the Court's review. In denying certiorari in *Middlemist*, however, the Court did not foreclose review of similar or even identical issues. The Tribes improperly argue the contrary. Employing this improper tactic, the Tribes do not assist the Court in evaluating this case.

2. The issues presented here, while related to those in *Middlemist*, do not arise in the same procedural condition and, in fact, present a better vehicle for reviewing and resolving important issues of tribal jurisdiction and the operation of the federal judiciary. As ably described in the brief of the Amicus Curiae, Rocky Mountain Oil and Gas Association ("RMOGA"), conflicts between the circuits and within circuits have arisen in the handling of such cases. In this case, unlike *Middlemist*, both the District Court and the Circuit Court took time to explain their reasoning for not requiring exhaustion of tribal remedies on the one hand and for reversing that decision on the other. In doing so, the District Court canvassed the variety of opinions from federal courts and wisely concluded that "under the facts of this case"—that is, a challenge to a tribe's assertion of sovereign power brought by a nonmember engaged in actviity on nonmember land prior to the initiation of any tribal proceeding [1]—exhaustion was not required. A24. In reversing, the Circuit

[1] These particular facts were crucial to the District Court's decision and should be central to any decision explicating this doctrine. The District Court's decision implicitly recognized the importance of two factors: whether the matter involves internal tribal affairs, for example, activity on tribal land or the fact of a tribal member as a party to the activity (not the lawsuit); and whether any tribal proceedings have begun. See A23-24 citing *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987); *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986); *Myrick v. Devils Lake Sioux MFG. Corp.*, 718 F.Supp. 753 (D.N.D. 1989).

Court adhered to the rule fashioned by the Ninth Circuit that any matter "arising on a reservation" must first go through tribal forums. A12. The overbreadth of this application of the *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) doctrine seems obvious when one considers that (1) Tribes, under controlling federal law, are not territorial sovereigns, (2) the existence of asserted tribal sovereign power over nonmembers is a purely federal issue, (3) that many legal contests arise on reservations involving no tribal members, (4) and that, in the application of similar doctrines to the adjudication of federal issues arising within a state and even involving state and local governments, whether there is or is not an ongoing state proceeding is the key criterion. *Steffel v. Thompson*, 415 U.S. 452, 462-463 (1974); *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*").

Indeed, employing strong language [2] the Eighth Circuit's concurring opinion revealed misgivings about requiring exhaustion of tribal remedies in the absence of ongoing proceedings in a manner indicating the validity of Duncan Energy's request that the Court address this important issue and provide guidance. A15-17. Moreover, in this case both the issues presented—whether exhaustion should be required and whether the second exception to the general principle that Tribes lack sovereign authority over nonmembers established in *Montana v. United States*, 450 U.S. 544 (1981), could allow the Tribes to exercise the jurisdiction under challenge here—were fully litigated. As to each issue, the District Court received motions, briefs, and affidavit testimony. Each set of parties had a full opportunity to submit facts and legal arguments in

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[2] "Requiring 'exhaustion' in a forum not chosen by any party looks like a subversion of the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.' *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)." A17.

support of their position as to each issue. The Circuit Court received full briefing on each issue and reviewed the case with the benefit of a record which each set of parties had the opportunity to fully develop. Thus, this case presents the Court the opportunity to review the entire litigative process employed by the District Court and rejected by the Circuit Court to fashion guidelines based on general principles which can be applied by the ever-growing number of District Courts faced with cases of this kind. *Middlemist*, in contrast, did not present such a full record because the District Court had granted the Tribes' motion to dismiss on exhaustion grounds and the matter had not proceeded to the substantive issue of tribal jurisdiction over nonmember activity on fee-owned lands.

3. As indicated by the Tribes' reliance on the denial of certiorari in *Middlemist*, should the Court deny certiorari here it should do so fully aware that the state of the law as to exhaustion, while clearly in disarray, will appear to lean heavily toward requiring exhaustion in all cases "arising on a reservation" no matter what the factual circumstances, the procedural posture, or the legal issues presented. While denial of certiorari is not to be construed as having any precedential effect, denial in this case will without question be construed as a pronouncement of law to the effect that all cases "arising on a reservation" must first go through any and all tribal forums. In that case, access to a federal forum for parties involved in such matters, while perhaps theoretically available after much delay[3], will have numerous obstacles, which, as a practical matter, will prove insurmountable to most litigants.

This state of affairs, Duncan Energy respectfully submits, stands at odds with the historic solicitude shown by

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[3] This, perhaps, is also uncertain, as noted by both the District Court (A23) and the concurrence in the Court of Appeals (A15-16), since in *Iowa Mutual, supra*, the Court appeared to foreclose federal review of issues decided by tribal courts. *Iowa Mutual*, 480 U.S. at 19.

this Court and the lower federal courts for ensuring access to federal courts to resolve federal questions and protect federal rights by requiring that they exercise their jurisdiction whenever invoked in all but the rarest circumstances. *Steffel*, 415 U.S. at 462-463; *NOPSI*, 491 U.S. at 358-59, 368. Since none of those circumstances are present here, a denial of certiorari and the requirement that Duncan Energy exhaust all tribal remedies even though none have yet been invoked cannot be squared with the Court's concern in all other types of cases to keep federal courts open to the litigation of federal issues.

4. Moreover, Duncan Energy submits that requiring exhaustion of remedies in this case is neither required by nor consistent with the Court's decisions establishing the doctrine. *National Farmers, supra; Iowa Mutual, supra.* Simply put the Tribes stretch these cases beyond their limits in arguing that exhaustion in the absence of ongoing proceedings is fully consistent with their holdings. In those cases there were ongoing proceedings, and both the analysis of the Court and the authorities on which it relied reveal that this fact was central to its decisions. To require exhaustion of tribal remedies in the absence of such proceedings would be to expand this doctrine beyond the limits of any comparable doctrine of abstention or exhaustion. If the Court intends the doctrine to have such a capacious sweep, this is not revealed in its decisions.

5. As outlined by the Amicus RMOGA, this has led to conflicts. The most recent cases indicate exhaustion is not required when a federal statute has preempted tribal sovereignty. *Public Service Co. of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir. 1994); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993). These cases support Duncan Energy's position since it argues that the 1910 Act abrogated tribal sovereign authority over nonmember fee lands and *ipso facto* preempted the reassertion of such authority now over Duncan Energy's operations.

II. WHETHER THE SECOND *MONTANA* EXCEPTION COULD SERVE AS A FOUNDATION FOR THE TRIBES' ASSERTED POWER WAS FULLY ARGUED HERE, UNLIKE *MIDDLEMIST*, AND PRESENTS AN OPPORTUNITY TO CLARIFY THE CONTOURS OF THIS EXCEPTION, WHICH AT LEAST TWO COURTS HAVE SAID ARE UNCERTAIN.

6. This case, unlike *Middlemist*, presents for review a fully adjudicated application of the second *Montana* exception. The District Court took affidavit testimony and legal arguments on Duncan Energy's motion for summary judgment. The Tribes had every opportunity to demonstrate some factual basis for their assertion that they have sovereign power to impose the taxes and regulations at issue because of the harm to tribal interests caused by Duncan Energy's operations, thereby raising an issue of material fact. The District Court found the Tribes had failed in this and therefore held that the second *Montana* exception to the general principle that Tribes do not have civil regulatory jurisdiction over nonmembers does not apply and the Tribes could not have the jurisdiction they assert. A22, A29-31. In reversing this decision, the Circuit Court erroneously held that the lower court had not considered the *Montana* exceptions. A9. In fact, the District Court received specific arguments from the Tribes in support of their contention that they do have jurisdiction based on the second *Montana* exception. It rejected these arguments in granting summary judgment for Duncan Energy. The Court of Appeals held this to be "inappropriate" on the grounds the lower court had not analyzed the Tribes assertions of jurisdiction in light of the second *Montana* exception. The District Court's opinion and the affidavits and briefs submitted in support of and in opposition to Duncan Energy's motion for summary judgment reveal this is clearly erroneous. The District Court did in fact analyze the applicability of the *Montana* exceptions and found that in this case the Tribes failed to raise material issues of fact warranting a trial on their assertion that, contrary

to the general principle, they have sovereign authority over Duncan Energy's operations to extract taxes and impose tribal hiring preference laws.

7. The District Court not only analyzed the applicability of the *Montana* exceptions, but reached the correct conclusion based on the facts and legal arguments placed before it. Both lower courts recognized the centrality of the construction of the 1910 Act (Act of June 1, 1910, 36 Stat. 455) for this issue. The legislative history of that Act, which Duncan Energy presented to both lower courts, contains the following passage concerning the applicability of state or federal law to the lands opened to settlement:

> Mr. Stafford. When the land has been open to settlement, does the gentleman contend that the local state prohibition law will not apply on that reservation?
>
> Mr. Hanna. Certainly it will apply.
>
> * * * *
>
> Mr. Burke of South Dakota. Congress has not reserved in any way the operation of the state laws from this country except as to the sale of liquor, that liquor was to be authorized to be sold at any time in that country.
>
> * * * *
>
> Mr. Bartholdt. Before the gentleman proceeds, I merely want to call the attention of the committee to the fact that under a decision of the Supreme Court, which was recently cited in the discussion of a similar provision, the Indian who lives on allotted lands becomes subject to the laws of the state the very moment that he settles on such lands, and consequently he is free from all police regulations by Congress. This ruling of the Supreme Court applies even more strongly in this case than it did in the case cited the other day, when a similar proposition came up for discussion.

45 Cong. Rec. 5797, 5798 (May 4, 1910).

The Northeast Quadrant, as a result of this act which, it is clear, was intended to allow the law of North Dakota to regulate activity on fee lands, is now owned almost entirely (97.7 percent) by nonmembers. A27.

8. If exhaustion is appropriate even when there are no ongoing tribal proceedings, then, this case presents the opportunity to review whether one of the exceptions to that doctrine applies when the substantive issue can be summarily resolved, because of the Tribe's clear lack of the asserted authority based on uncontroverted facts as analyzed against federal enactments, legislative history and the principles of res judicata. In this case, for example, Duncan Energy would argue an exception to this doctrine should apply because of the demographic and landownership facts noted above and in the Petition, because of the intent of Congress in opening the Northeast Quadrant by enacting the 1910 Act, and, as to res judicata, because the Tribes have been adjudged to have been divested by Congress, using its plenary power (*Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)), of all interest in alienated lands in the Northeast Quadrant. *The Affiliated Tribes of the Fort Berthold Reservation v. United States*, 16 Indian Claims Commission 341 (1965).[4]

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[4] The Indian Claims Commission statute, Ch. 959, 60 Stat. 1049 (1946), authorized suits against the United States for compensation for taking of lands based on all legal, equitable claims. The Tribes, therefore, sued seeking just compensation for the lands patented to homesteaders under the 1910 Act. In that case, the Tribes themselves recognized Congress's plenary authority to open these lands. *Id.* at 366. The Indian Claims Commission held that by passage of the 1910 Act Congress had used its power to quiet the Tribes' possessory rights to this surplus land and that, therefore their rights to this land had been abrogated by the Act. Thus, the 1910 Act had the same effect as the acts considered in *Montana, Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989) and *South Dakota v. Bourland*, —— U.S. ——, 113 S.Ct. 2309 (1993), and the Tribes' reassertion of sovereign power over these lands is an attempt to exercise power the courts have previously found Congress had eliminated.

Rejecting this, the Circuit Court in essence held that in no case can a Tribe's assertion of authority based on the second *Montana* exception be summarily decided. Not only this holding but the continued viability of the second *Montana* exception as a basis for the exercise of tribal sovereign power beg for review and clarification by the Court. First, there appears no principled reason a summary proceeding could not be properly employed to dispose of a Tribe's assertion of authority. In this case, as the amici states pointed out, the Tribes made their showing and it failed to demonstrate the Tribes' regulations addressed in any way the alleged harm caused by Duncan Energy's activities. Brief of Amici States, at n.2.

9. Moreover, after *Brendale, supra,* and *Bourland, supra,* the meaning and substantive effect of the second *Montana* exception require clarification. The *Brendale* plurality asserted a proper showing under this exception gave rise not to sovereign authority in the Tribe but to a federal cause of action. *Id.* at 429-430. The concurrence did not address this. In *Bourland* the seven-member majority held that the alienation of land in fee abrogated tribal sovereign authority. *Bourland,* 113 S.Ct. at 2316, 2318, 2320, n.15. Yet the Court remanded the case, in part, for an analysis under this very exception. On remand, the Eighth Circuit, as noted by the ten amici States and RMOGA, was well aware of the unresolved status of this exception, declining to "consider [or] decide whether Justice White's *Brendale* opinion modified the second *Montana* exception for cases such as that presented here." *Bourland,* 39 F.3d 868, ——, n.4. Similarly, the Supreme Court of South Dakota noted on this issue that it is an open question whether a showing under the second *Montana* exception results in tribal sovereign authority or a cause of action: "*Montana* went on to note, *without deciding,* that a tribe may have other authority as well. . . ." *Red Fox v. Hettich,* 494 N.W.2d 638, 646 (1993). (Emphasis added.)

CONCLUSION

Uncertainty clearly exists as to the meaning of this exception to the general rule that Tribes do not have sovereign authority over nonmember activity on fee land. Duncan Energy respectfully submits the Court should review the issue and resolve it.

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